TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted]74

JESSE B. HUSE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 13, 1906.

(21,732.)

(21,732.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 253.

JESSE B. HUSE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1910.

1 In the Court of Claims.

No. 28727.

JESSE B. HUSE
vs.
THE UNITED STATES.

I. *Petition and Amended Petition.*

On the 29th day of November, 1905, the claimant filed his original petition. Subsequently, to wit on the 9th day of November, 1907, by leave of court, the claimant in lieu of said original petition filed his amended Petition which is as follows:

2 In the Court of Claims of the United States.

No. 28727.

JESSE B. HUSE
vs.
THE UNITED STATES.

Amended Petition.

Filed November 9, 1907.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, Jesse B. Huse, respectfully represents:

1. That he is a citizen of the United States and resident of the State of Nebraska.

2. Under date of the 16th of September, 1901, the United States, through its Postmaster General advertised for bids for the performance of screen wagon service on postal route No. 457,005 at Omaha, Nebraska, for the period between the first day of July, 1902, and the 30th day of June, 1906.

3. In response to said advertisement, and acting upon the faith thereof, your petitioner submitted a bid for said work, agreeing to perform the same in accordance with said advertisement, for the sum of $7889.00, said bid being the lowest submitted, was thereafter accepted.

4. On the 15th day of June, 1902, the United States through its Postmaster General, duly entered into a contract with the claimant, whereby the latter was to perform said work for the sum of
3 $7889.00, for the period of four years, beginning with the first day of July, 1902, and ending on the 30th day of June,

1906, a copy of which contract is hereby referred to and prayed may be made a part hereof.

5. That in and by the said contract, the said advertisement was made a part thereof, with like force and effect as if incorporated therein.

6. Your petitioner further represents that in said advertisement, it was provided that mails from the general postoffice should be carried among others, to the Union Station fifteen trips to be made daily and thirteen trips on Sundays or a total of one hundred and three trips weekly. That eleven trips were to be made daily from said station to the postoffices, except on Sunday when ten trips only were required thus making a total of seventy-six trips weekly from the station.

7. Your petitioner further states that in said advertisement, it was represented that the mails to be carried to the Union Station were for the Illinois Central Railroad Company, route No. 143,077, Union Pacific Railroad Company, route No. 157,001, Chicago, Rock Island & Pacific Railway Company, route No. 157,064 and Missouri Pacific Railway Company route No. 157,075, whereas, as a matter of fact, your petitioner represents he was required to carry mail to and from said Union Station for the Chicago & Northwestern Railroad Company, The Chicago, Milwaukee & St. Paul Railroad Company
4 and the Wabash Railroad Company, in addition to the roads hereinbefore referred to, which said latter roads were not named or enumerated in said advertisement or said contract.

8. Your petitioner further represents that on the first day of July, 1902, he tendered himself as ready to undertake the performance of the said contract, but the Postmaster arbitrarily declined to permit him to undertake the same until the 21st day of August, 1902, upon the alleged ground that claimant did not have sufficient equipment to properly perform the service; your petitioner avers that he was ready, willing and had the necessary, proper equipment for the performance of the said contract on the first day of July, 1902, and by reason of the unlawful action of the defendant through its duly authorized representative, your petitioner and his outfit were kept idle between the first day of July, 1902, and the 21st day of August, 1902, at a loss of $1095.66.

9. Your petitioner further represents that he faithfully executed the said contract so entered into by him between the 21st day of August, 1902, and the 20th day of May, 1903, at a loss to him of $7,111.00, which resulted by reason of the requirement of the defendant compelling your petitioner under protest to carry mail to and from the Chicago & Northwestern Railroad Company, The Chicago, Milwaukee and St. Paul Railroad Company and the Wabash Railroad Company, entering and departing from the Union Station, which said roads were neither mentioned in the advertisement nor covered by the contract entered into with petitioner pursuant thereto, for which he was required to furnish addi-
5 tional outfit; your petitioner therefore, claims judgment for the sum of $7,111.00.

10. Your petitioner further represents that he furnished ample and proper equipment for the transportation of said mail; that in addition to the expense incurred to him by reason of the increased amount of mail transported by him for the United States coming and going over the Chicago & Northwestern Railroad Company, The Chicago, Milwaukee & St. Paul Railroad and the Wabash Railroad Company, numerous unreasonable delays occurred in the arrival of trains, varying from one hour to twenty-four hours, which were not anticipated at the time of entering into the contract, and by reason of which, and the impossibility of anticipating the time of their arrival great loss resulted to your petitioner and amounted fully to the sum of $2000.00 for said period, for which expense by reason of such delay, no compensation whatever was paid to your petitioner.

11. Your petitioner further represents that through the unwarranted and arbitrary action of the representatives of the Government, there was withheld from him compensation for the period between the first day of January, 1903, and the 20th day of May, 1903, during which period he carried the mails for the Government, which amounted to $3003.79.

12. Your petitioner further represents that through the unwarranted and arbitrary action of the Postmaster General, your petitioner was treated as a failing contractor from and after the
6 20th day of May, 1903, at which time your petitioner was relieved from further service and the contract was re-let at the rate of $13,250.00 per annum.

13. Your petitioner further represents that had he been required to carry the mail to and from the railroads entering the Union Station specified in the said advertisement only and not to the Chicago, Milwaukee & St. Paul, the Chicago, Northwestern and the Wabash Railroads, he would have made a profit of $1500.00 per annum; that by reason of the unwarranted annullment of the said contract by the defendant, your petitioner has lost the profits for the period covered by the said contract of the reasonable value of $6000.00 for which sum, he claims judgment.

14. That upon undertaking the said contract, your petitioner was required to provide sufficient outfit of horses, harness and new wagons and upon the unwarranted annullment of the said contract with your petitioner as aforesaid, he was required to dispose of his said outfit of horses, harness and wagons at a loss of $1000.00, for which sum he claims judgment.

15. Your petitioner further represents that upon undertaking the said contract, he protested against the action of the defendant in requiring him to perform the services hereinbefore referred to and not covered thereby; that he demanded compensation for said extra service, which was denied.

7 16. Your petitioner further represents that he is the sole owner of the claim herein sued upon and that it has not been sold or assigned to any person and that there has been no other action thereon than as above set forth.

Wherefore your petitioner avers that he has been damaged by reason of the premises in the sum of $19,114.79, to which amount

he is justly entitled, after allowing all just credits and setoffs, and for which amount he prays judgment against the United States.

F. WALTER BRANDENBURG.

E. C. BRANDENBURG,
F. W. BRANDENBURG,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

F. Walter Brandenburg upon oath deposes and says that he is one of the attorneys for the claimant herein and as such attorney has read the foregoing petition by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and those stated upon information and belief, he believes to be true.

F. WALTER BRANDENBURG.

Subscribed and sworn to before me this 8th day of November, A. D. 1907.

[SEAL.]

LLOYD A. DOUGLASS,
Notary Public, D. C.

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II. *Traverse.*

Filed April 1, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 28727.

JESSE B. HUSE
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

III. *Argument and Submission of Case.*

On the first and second days of April, 1908, this cause came on to be heard; and was argued by Mr. E. C. Brandenburg for the claimant and by Mr. Joseph Stewart and Mr. George M. Anderson for the defendants and submitted.

9 IV. *Findings of Fact (as Amended) and Conclusion of Law.*

Filed by the Court.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

On September 16, 1901, the Postmaster-General of the United States advertised for proposals for carrying mails in various cities, and among others, for screen-wagon, mail-messenger, transfer, and mail-station service at the city of Omaha, Nebr., on what is known as route No. 457,005, for the period between July 1, 1902, and June 30, 1906. Said advertisement, omitting all cities therein named except Omaha, Neb., was as follows:

Proposals for Screen-wagon, Mail-messenger, Transfer, and Mail-station Service.

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *September* 16, 1901.

Proposals will be received at the office of the Second Assistant Postmaster-General, Post-Office Department, until 4 p. m. of December 3, 1901, for carrying the mails of the United States in the screen wagons prescribed by the Department, on the routes herein specified, being screen-wagon, mail-messenger, transfer, and mail-station service, in the cities and towns hereinafter named, between the post-offices, between the post-offices and railroad stations, between the post-offices and steamboat landings, between the post-offices and mail stations, between the post-offices and points of exchange with electric or cable cars, and between the several post-offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, as prescribed herein, for the term from July 1, 1902, to June 30, 1906, viz:

* * * * * * *

Omaha, Nebr.

Decisions announced on or before January 15, 1902.

Contracts to be returned to the Department duly executed within thirty days from date of acceptance of proposals.

Bidders should read carefully the instructions contained in this advertisement, and should be careful to properly fill all of the blanks in the proposal, as proposals which are not in proper form can not be accepted.

The law requires a bond, oath of bidder, oath of surety, and certificate of postmaster with every proposal.

Postmasters should give as much publicity as possible to this advertisement, bring it to the attention of persons who would be likely to submit proposals, and endeavor to secure competition for the service.

No proposal submitted under this advertisement will be considered unless the bidder shall agree in his proposal that in the event of the service being awarded to him he will give his personal supervision to the performance of the service and will reside on or contiguous to the route.

Postmasters should retain a copy of this advertisement for future reference.

(Here follows schedule of service marked p. 10.)

ROUTE NO. 457005. SCREEN-WAGON SERVICE AT OMAHA, NEBR.

Schedule of service as performed for the week ended July 27, 1901.

MAIL-MESSENGER SERVICE.

From the general post-office to the following-named railroad stations, steamboat landings, electric or cable cars:	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of trips a week.	Running time.
	Miles.					*Min.*
Burlington Station	1.22	9	9	.....	63	25
Chicago, Burlington and Quincy R. R. Co. (157002-157004).						
Union Station	1.10	15	13	.....	103	23
Illinois Central R. R. Co. (143077).						
Union Pacific R. R. Co. (157001).						
Chicago, Rock Island and Pacific Rwy. Co. (157064).						
Missouri Pacific Rwy Co. (157075).						
Webster Street Depot	.52	11	8	.....	74	15
Chicago, St. Paul, Minneapolis and Omaha Rwy Co. (157003).						
Fremont, Elkhorn and Missouri Valley R. R. Co. (157051).						
Missouri Pacific Rwy. Co. (155040).						
Omaha Street Rwy. Co. (Fourteenth and Dodge streets) (357005)	.22	11	3	.....	69	6
Omaha Street Rwy. Co. (Dodge street, opposite post-office) (357005)	.02	10	1	.....	61	2
Omaha and Council Bluffs Rwy. and Bridge Co. (Fourteenth and Douglas streets) (343004)	.27	9	4	.....	58	7

To the general post-office from the following-named railroad stations, steamboat landings, electric or cable cars:	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of trips a week.	Running time.
	Miles.					*Min.*
Burlington Station	1.22	8	7	.....	55	25
Chicago, Burlington and Quincy R. R. Co. (157002-157004).						
Union Station	1.10	11	10	.....	76	23
Illinois Central R. R. Co. (143077).						
Union Pacific R. R. Co. (157001).						
Chicago, Rock Island and Pacific Rwy. Co. (157064).						
Missouri Pacific Rwy. Co. (157075).						
Webster Street Depot	.52	6	2	.....	35	15
Chicago, St. Paul, Minneapolis and Omaha Rwy. Co. (157003).						
Fremont, Elkhorn and Missouri Valley R. R. Co. (157051).						
Missouri Pacific Rwy. Co. (155040).						
Omaha Street Rwy. Co. (Fourteenth and Dodge streets) (357005)	.22	9	4	.....	58	6
Omaha Street Rwy. Co. (Dodge street, opposite post-office) (357005)	.02	9	4	.....	58	2
Omaha and Council Bluffs Rwy. and Bridge Co. (Fourteenth and Douglas streets) (343004)	.27	8	4	.....	52	7

ROUTE NO. 457005. SCREEN-WAGON SERVICE AT OMAHA, NEBR.—Continued.

Schedule of service as performed for the week ended July 27, 1901.

TRANSFER SERVICE.

From the following-named railroad stations, steamboat landings, electric or cable cars:	To the following-named railroad stations, steamboat landings, electric or cable cars:	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of trips a week.	Running time.
		Miles.					*Min.*
Union Station (157001-157064-157075-143077).	Burlington Station (157002-157004).	0.31	7	7	.....	49	10
Burlington Station (157002-157004).	Union Station (157001-157064-157075-143077).	.31	6	6	.....	42	10
Omaha Street Rwy. Co. (Tenth street viaduct) (357005).	Union Station (157001-157064-157075-143077).	.10	5	3	.....	33	5
Union Station (157001-157064-157075-143077).	Omaha Street Rwy. Co. (Tenth street viaduct) (357005).	.10	6	1	.....	37	5
Omaha Street Rwy. Co. (Tenth and Mason streets) (357005).	Burlington Station (157002-157004).	.10	8	.....	.....	48	5
Burlington Station (157002-157004).	Omaha Street Rwy. Co. (Tenth and Mason streets) (357005)	.10	3	2	.....	21	5
Omaha Street Rwy. Co., Dodge Street Line (357005).	Omaha Street Rwy. Co., Fourteenth Street Line (357005).	.02	5	2	.....	32	2
Omaha Street Rwy. Co., Fourteenth Street Line (357005).	Omaha Street Rwy. Co., Dodge Street Line (357005).	.02	9	2	.....	56	2

MAIL-STATION SERVICE

From—	To—	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Total number of trips a week.	Running time.
		Miles.				*Min.*
Post-office	Station A	1.96	5	2	32	40
Station A	Post-office	1.96	4	2	26	40
Post-office	Station B	1.95	5	2	32	40
Station B	Post-office	1.95	5	2	32	40

NOTE.—Mail service may be established on the Omaha Street Railway on line between Omaha and Benson. If so service to and from that line will be necessary, and the contractor will be required to perform it without additional pay.

Present annual pay for wagon service under existing contract, route No. 457004, $2,650; and mail-messenger route No. 257124, $2,400. (See paragraph 10, Instructions to Bidders.)

Bond required with bid, $15,000.

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II.

The Instructions to Bidders which were made a part of said advertisement and contract contained, among others, the following provision:

"1. The foregoing schedules show approximately the service as performed during the week named in the statement of service for each route. Bidders, however, must personally inform themselves of the amount and character of the service that will be required during the contract term, beginning with July 1, 1902. Bidders and their sureties are warned that they should familiarize themselves with the terms of the contract, schedules of service, and instructions contained herein before they shall assume any liabilities as such bidders or sureties, to prevent misapprehension or cause of complaint thereafter."

III.

On October 30, 1901, claimant submitted a proposal to carry the mails pursuant to the requirements and conditions of said advertisement for the sum of $7,889 per annum, which contained, among other things, the following:

"This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service; and also after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby."

Prior to submitting said proposal the claimant carefully read the advertisement and instructions to bidders and familiarized himself with their terms, and knew that the trains of the Chicago and Northwestern Railroad, the Chicago, Milwaukee and St. Paul Railroad, and the Wabash Railroad entered the Union Station at Omaha, and to further inform himself as to the amount and character of the service to be performed he consulted the postmaster and superintendent of mails at Omaha, who called his attention to the Instructions to Bidders, also a Mr. Anderson, who had been in charge of the work under a former contract, who explained to him the three depots, including the Union Station, and the mail to be taken from them and the number of wagons it would take to perform the service.

Thereafter said proposal was accepted by the Postmaster-General, and on January 15, 1902, claimant entered into the following contract:

"Contract for Mail Service.

"Screen-wagon Service in the City of Omaha, Nebraska.

"Route No. 457005.

"Annual rate of pay $7,889.00.

"Contractor's address: Omaha, Douglas Co., State of Neb.

"This article of contract, made the 15th day of January, nineteen hundred and two, between the United States of America (acting in this behalf by the Postmaster-General) and Jesse B. Huse, contractor, and the United States Fidelity and Guaranty Company of Baltimore, Md., and —— ——, of ——, as his sureties:

"Witnesseth, that whereas Jesse B. Huse, has been accepted as contractor for transporting the mails on route No. 457005, being the screen-wagon service at the city of Omaha, Nebraska, under an advertisement issued by the Postmaster-General on the 16th day of September, 1901, for such service, which advertisement is hereby referred to and made by such reference a part of this contract, and for performing such additional service of said kind, or kinds, as is provided by the terms of said advertisement, which may at any time during the term of this contract be required in said city, at the rate of seven thousand eight hundred and eighty-nine dollars per annum, for and during the term beginning the first day of July, 1902, and ending June 30, 1906.

"Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agreed with the United States of America, and do bind themselves—

12 "First. To carry said mail in a safe and secure manner, using therefor substantial, one or two horse, screen wagons, of the kind more fully described in the advertisement above referred to, in sufficient number and of sufficient capacity, to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in said advertisement; the wagons to be new at the beginning of the contract term, of first-class material and construction, suitable for the proper performance of the service, affording complete protection to the mails from depredation, inclement weather, or other injury, to be kept thoroughly painted, cleaned, and in good condition at all times, and subject in all respects to the approval of the Postmaster-General.

"Second. To take the mail from, and deliver it into, the post-office, railroad stations, mail station, electric or cable cars, and cars at such points and at such hours, under the directions of the postmaster at said city, approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

"Third. To furnish the number of said wagons (of the required sizes) that, in the opinion of the postmaster at said city, approved by the Postmaster-General, will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, withdrawn from service for repairs, or required for special or advance trips.

"Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and, further, that said contractor shall not com-

mit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language.

"Fifth. To discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster-General so to do; not to transmit by themselves, or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

"Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties, or employees.

"Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

"Eighth. To carry post-office blanks, mail locks and mail bags, and all other postal supplies.

13 "Ninth. To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger, on the driver's seat of each wagon.

"Tenth. To perform, without additional compensation, any and all additional service that the Postmaster-General may order during the contract term, between post-offices, between the post-office and railroad stations, between the post-office and steamboat landings, between the post-office and mail stations, between the post-office and the points of exchange with electric or cable cars, and between the several post-offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, named in the schedule of service for said route in said advertisement. Also to perform, without additional compensation, any and all additional service during the contract term that may be caused by changes of site of said post-offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars; and to and from any new railroad station within the city used by a company named in the schedule of service, and also such mail-messenger service as may be necessary between the post-office and a new railroad using the depot of a railroad named in the schedule of service, and such transfer and mail station service as may be necessary to and from such railroad; provided that in the case of a mail station the increase in distance traveled by reason of such change of site does not exceed one-quarter of a mile per trip each way; the discontinuance of a mail station and the establishment of another in its stead not involving an increase in travel of more than one-quarter of a mile each way per trip to be regarded as a change of site, and no additional pay to be allowed for the increased service caused by such change.

"For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said contractor is to be paid by the United States at the rate per annum hereinbefore named; payments to be

made quarterly, in the months of November, February, May, and August, or as soon thereafter as accounts can be adjusted and paid, said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

"It is hereby stipulated and agreed by said contractor and his sureties that the Postmaster-General may change the schedule, vary, increase, or decrease the trips on this route, or extend the trips to any new location of the post-offices, railroad stations, steamboat landings, mail stations, or points of exchange with cable or electric cars named in the schedule of service for said route in said advertisement without change of pay; provided that in case of a mail station the increase in distance traveled to and from such new location does not exceed one-quarter of a mile each way per trip; and that the Postmaster-General may discontinue the entire service under this contract whenever the public interest, in his judgment, shall require such discontinuance, but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

"And it is further stipulated and agreed, that for a failure to deliver the mail not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail
14 at the places required herein, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor shall forfeit, and there may be withheld from his pay, such sum as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

"And it is further stipulated and agreed, that the Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.

"And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor for the Post-Office Department.

"And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express

terms for a period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster-General.

"And it is further stipulated, that no member of, or delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

"And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads."

IV.

At the beginning of the contract term, July 1, 1902, claimant had not provided the necessary wagons for the performance of the service under his contract as required by the Postmaster-General, and for that reason he was not permitted to commence said service until August 21, 1902, at which date he had provided himself with such equipment. From July 1 to August 21, 1902, the Postmaster-General authorized temporary service and charged the cost thereof to claimant to the amount of $1,108.70, and in addition a fine of $50 was imposed for his failure to provide the necessary equipment as aforesaid.

V.

Under said contract the Postmaster-General required claimant to carry the mails which arrived at and departed from the Union
15 Station over the Union Pacific Railroad tracks on the trains of the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul, and the Wabash railroads, in addition to the mails arriving and departing over the roads specifically mentioned in the advertisement as set forth in Finding I, without additional compensation, which claimant did under protest. Before entering upon the performance of his contract and after the execution thereof the claimant was informed by the Postmaster that he would be required to carry said mails. It appears that after entering into said contract, to wit, between February 18 and August 21, 1902, the claimant performed service for the United States as temporary contractor under a prior contract therefor, and as such temporary contractor he carried all the mail to and from Union Station, including the mails arriving and departing on the trains of said three roads over said Union Pacific tracks. The Chicago, Rock Island and Pacific Railway Co., and the Missouri Pacific Railway Co., also crossed the Missouri River from Council Bluffs over the bridge of the Union Pacific railroad in order to enter the Union Station at Omaha, each operating under a separate mail route contract, to-wit: 157064 and 157075.

VI.

At the time of said advertisement of September 16, 1901, and for a number of years prior thereto, there were no railroad routes stated into Omaha, Nebr., in the names of the Chicago and Northwestern Railroad Company, the Chicago, Milwaukee and St. Paul Railroad Company, or the Wabash Railroad Company. The contract routes

of said three companies for carrying the mails, namely, routes 135003, 143028, and 145061, from Chicago, Marion, and Pattonsburg, Mo., respectively, all terminated at Union Pacific Transfer, Iowa (Council Bluffs), at which latter place all mail was for many years transferred to trains of the Union Pacific Railroad and by them carried into Omaha. From about the time the Union Station was built, long prior to the advertisement in the present case, said three roads procured an entrance into Omaha over the tracks of the Union Pacific Railroad; and the Post-Office Department, to avoid delay in transfer, arranged with said roads and the Union Pacific road for said three roads to carry the mail from said Council Bluffs on the route, track, and on the time prescribed by said Union Pacific road to the Union Station in Omaha. The trains so performing said service were known and treated by the Post-Office Department as mail trains of the Union Pacific Railroad Company, route No. 157001, and were operated under the rules of said Union Pacific Railroad Company, and payment was made therefor to the said Union Pacific Company. All weights of mail carried by said three roads were credited to the Union Pacific Railroad route and weighed thereon. The screen-wagon contractor under the preceding advertisement and contract, which were similar to the one in this case, carried mails to and from the trains of said three roads as part of his contract, and these facts were known to persons having knowledge of the service.

VII.

From August 21, 1902, claimant gave his personal supervision to the work under the contract, and on the 1st days of September and October, 1902, the postmaster at Omaha reported that the horses, wagons, and harness used by claimant were in good condition and in accordance with the requirements of the contract.

16 VIII.

At various times throughout the period claimant was engaged in service under his contract he failed in its performance in respect to the kind of help he employed, and also failed to keep his horses and wagons in good condition; he kept in his employ boys and drivers who were careless and neglectful at times in receiving and delivering mail, and particularly from street cars and the platform at the post-office, frequently putting pouches on the wrong electric cars and leaving wagons unlocked; and he failed to have his drivers wear the regulation caps and badges, and to comply with the instructions of the Postmaster-General. For such failures and delinquencies not satisfactorily explained to the Postmaster-General he imposed fines amounting to the sum of $288 up to January 1, 1903, which were paid. Other fines were imposed for failures between that date and May 20, 1903, amounting to $49.50, which amount has not been paid by claimant.

IX.

March 24, 1903, claimant asked to be relieved from his contract, claiming that owing to the construction placed upon it by the Post-

Office Department he could not perform the service required. This request was refused by the Postmaster-General.

April 15, 1903, the Department wrote to claimant giving him until July 1, 1903, to improve the service, and requiring him to make certain repairs to his equipment, and to replace ten horses by May 10, 1903. Claimant failed to comply with these requirements, and on May 20, 1903, the Post-Office Department annulled said contract with claimant because of his failure and refusal to comply with the instructions of the Postmaster-General as set forth in Finding VIII.

X.

Upon the annulment of said contract as aforesaid the Post-Office Department installed a temporary service from May 20 to October 1, 1903, at the rate of $14,965 per annum, amounting for said period to the sum of $2,525.46 in excess of the rate provided by contract with claimant, and a contract was awarded to other parties at the rate of $13,250 per annum for the period from October 1, 1903, to June 30, 1906, for the same service that claimant was required to perform under his said contract, making an excess cost to the Government of $14,742.75 over claimant's contract price for said last-named period.

XI.

The weight of mail carried by claimant to and from the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul, and the Wabash railroads was equal to about two-fifths of the total weight of all the mail carried to and from Union Station, and a reasonable compensation for carrying same, upon the basis of claimant's contract, from August 21, 1902, to May 20, 1903, if claimant is entitled to recover therefor in this action, would be $2,366.70.

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XII.

After the annulment of his contract claimant di-posed of his horses, wagons, and outfit at a loss of $900 on the wagons and harness.

XIII.

Claimant has not been paid for service under his contract from January 1 to May 20, 1903, which at the contract price amounts to $3,034.22, from which should be deducted $49.50 for fines imposed by the Department, leaving a balance, if the claimant is entitled to recover, of $2,984.72.

XIV.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

18 V. *Opinion of the Court.*

PEELE, *Ch. J.*, delivered the opinion of the court:

This is a claim for extra or additional compensation for carrying the mails to and from the post-office and the Union Station at Omaha, Nebr., and for profits prevented by the cancellation of the mail contract between the Government and the claimant.

The advertisement for proposals recited, among other things, that proposals would be received for carrying the mails in the screen wagons prescribed by the Department on the routes specified as "screen-wagon, mail-messenger, transfer, and mail-station service" in the city of Omaha, Nebr., being route No. 457005, "between the post-offices and railroad stations," steamboat landings, mail stations, electric and cable cars, etc., for the term from July 1, 1902, to June 30, 1906.

With said advertisement was a schedule showing, among other things, the service as it had been performed for the month ending July 27, 1901, namely:

Union Station:

Illinois Central R. R. Co. (143077).
Union Pacific R. R. Co. (157001).
Chicago, Rock Island and Pacific Rwy. Co. (157064).
Missouri Pacific Rwy. Co. (157075).

As the postal routes on the Chicago and Northwestern Railroad, the Chicago, Milwaukee and St. Paul Railroad, and the Wabash Railroad, Nos. 135003, 143028, and 145061, respectively, all terminated at Union Pacific Transfer, Iowa (Council Bluffs), from which point their mail was carried into the Union Station on the tracks of the Union Pacific Railroad Company (route 157001), the Department it appears deemed it unnecessary to specify those roads in the schedule, and particularly as the mail trains of those roads were operated from Council Bluffs, Iowa, to the Union Station, Omaha, as Union Pacific trains and the Union Pacific Railroad Company was paid therefor.

But the claimant contends that when he made his proposal he was not aware that he would be required to carry the mails from these three roads or from any road except those specifically mentioned in the schedule submitted with the advertisement.

Unfortunately for this contention, however, there was submitted with the advertisement "Instructions to Bidders," which, among other things, recited that the schedule submitted showed "approximately the service as performed during the week named," and for that reason bidders were admonished to "personally inform themselves of the amount and character of the service that will be required during the contract term, beginning with July 1, 1902."

Futhermore, bidders and their sureties were "warned that they should familiarize themselves with the terms of the contract, schedules of service, and instructions contained herein before they

shall assume any liabilities as such bidders or sureties, to prevent misapprehension or cause of complaint thereafter."

As an additional precaution bidders were required in making their bids to use the forms prepared by the Department, which the claimant did, reciting, among other things, that "this proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service, and also after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby."

It will thus be noted that the service for which bids were advertised was only shown by the schedules approximately, and bidders were cautioned to personally inform themselves both of the amount and character of the service to be required, and then to certify that the proposal made by them was after due inquiry and with a full knowledge of all the particulars in reference to the service. This the claimant says he did, as shown in Finding III.

The advertisement cast upon the claimant the duty and responsibility, before he made his bid, of ascertaining for himself "the amount and character of the service that will be required during the contract term," and if he made due inquiry, as he says he did, before submitting his proposal he was undoubtedly advised of the amount and character of the service that would be required of him, which was to include all the mails entering the Union Station; hence whether we consider the claimant's efforts to ascertain the particulars in reference to the service as insufficient or whether we consider him as having neglected to make due inquiry, we must consider him as having obtained the information he might by proper diligence have ascertained, especially when he says his proposal was made "after due inquiry into and with full knowledge of all the particulars in reference to the service."

19 There was no guarantee by the Government as to the amount of mail that the claimant would be required to carry other than all the mails entering the Union Station, and as to that he was admonished to make inquiry for himself.

The advertisement, made part of the contract, without doubt called for bids to carry all the mail from the Union Station in screen wagons prescribed by the Department on the one route (457005) described as "screen-wagon, mail-messenger, transfer, and mail-station service * * * between the post-offices and railroad stations" in the city of Omaha; and when the claimant said he proposed "to carry the mails of the United States from July 1, 1902, to June 30, 1906, on above-numbered route" he meant all the mail entering the railroad stations, and therefore, all the mail carried into the Union Station on route No. 157001 on the tracks of the Union Pacific Railroad Company.

The contract which the claimant signed was in conformity with the advertisement, and was equally as explicit, and obligated the claimant to carry "the whole of said mail, whatever may be its size, weight, or increase" during the term prescribed in the advertisement. That is to say, the claimant obligated himself "to take the mail from, and deliver it into, the post-office, railroad stations, mail sta-

tions, electric or cable cars, and cars at such points and at such hours, under the directions of the postmaster at said city, approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage."

The claimant could not have understood from that language that he was dividing the responsibility of carrying the mails on that screen-wagon route 457005 with some one else to and from the railroad stations. He must have understood, as by the language of the contract he was bound to know, that he alone was to take the whole of said mail from and deliver it into the post-office and railroad stations in said city, including all the mail arriving on the route of the Union Pacific Railroad.

The contract may have proved an unfortunate one for the claimant; but as by the advertisement and instructions to bidders the way was open to him to ascertain, if he did not do so, all the facts essential to enable him to know the amount and character of the service to be performed, his failure can not be charged to the Government, nor to its officers, especially since by the instructions to bidders he was informed that the schedule showed only the approximate service to be performed.

The service required of the claimant by the Postmaster-General, of taking the mail from the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul, and Wabash railroad companies, entering the Union Station on the tracks of the Union Pacific Railroad Company, as aforesaid, can not be considered either as new extra or additional service, within the meaning of these terms as adjudicated by this court. Utah, Nevada and California Stage Co. v. The United States, 39 C. Cls., 435. Profit v. United States, 42 ibid., 248, and must, therefore, be held to be part of the service contemplated and covered by the terms of the contract; and the claimant is not, therefore, entitled to recover for said service.

On May 20, 1903, the Postmaster-General annulled the contract because, as set forth in findings VIII and IX, the claimant failed and refused to comply with the same. In this respect paragraph 31 of the instructions to bidders provided that "The Postmaster-General may annul a contract for repeated failure; for violating the postal laws; for disobeying the instructions of the Post-Office Department," etc. They also specified the kind and number of horses and wagons, and how they should be kept, all which including the service, were to be subject to the approval and control of the postmaster; and the property was to be subject to frequent inspection to ascertain its condition; and the failure or refusal of the claimant to keep his horses, wagons, and harness in good order and appearance, or to obey the instructions of the Postmaster-General was sufficient cause for the annulment of the contract. The tenth paragraph of the contract is to the same effect.

The authority given to the Postmaster-General over the mails is sufficiently broad and comprehensive to enable him to annul a contract whenever a contractor refuses to perform according to his contract and the regulations of the Post-Office Department or whenever,

in his judgment—unclouded by fraud or gross error—the public interests demand it. He may discontinue the entire service under the contract upon the payment of one month's extra pay. (Slavens v. United States, 38 C. Cls. R., 574, affirmed by the Supreme Court, 196 U. S., 229, and other authorities which might be cited.) But in the present case the contract was annulled because of the repeated failure of the contractor to comply with his contract and the regulations of the Department, as set forth in Finding VIII, and, therefore, the question of one month's extra pay does not arise.

There is no contention that the Postmaster-General grossly abused the discretion lodged in him to annul the contract. The facts upon which he based his action were ascertained by the officers of the Government in the usual way; and there is nothing in this case which would justify the court in holding that he abused his discretion, even if the court felt at liberty to go behind the facts upon which he based his action.

The failure of the claimant to comply with the contract and the instructions of the Postmaster-General as herein set forth was not only sufficient ground to authorize the Postmaster-General to annul the same (section 1292, Postal Laws and Regulations, under act August 3, 1882, 22 Stat. L., 216), but was sufficient authority for the Postmaster-General to withhold payment to the claimant for service performed and to relet the contract or service to another at the claimant's expense, which was done, and therefore, he is not entitled to recover on this branch of the case.

The claimant entered into the contract after due inquiry as to the amount and character of the service to be performed, as he was admonished and warned to do before making his bid, thereby obligating himself to the performance of the service so contracted to be performed under the direction of the Postmaster-General and the regulations of the Post-Office Department, and he must therefore be held to the contract he made and to the performance of the service thereunder, as was doubtless understood and contemplated by the parties at the time of the execution of the contract.

The petition is dismissed.

21 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington, D. C., on the 7th day of December, 1908, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order adjudge and decree that the petition of the claimant Jesse B. Huse be and the same is hereby dismissed.

BY THE COURT.

22 VII. *Order of Court.*

On Claimant's motion for new trial and for an amendment of findings of fact filed February 3, 1909, the court on March 1, 1909, filed the following order to wit:

No. 28727.

JESSE B. HUSE
v.
UNITED STATES.

Order.

The claimant's motion for new trial is overruled.

The motion to amend findings is allowed in part and overruled in part, and findings I and V amended as shown on the original file copy of the findings.

The Judgment and Opinion to stand.

BY THE COURT.

Filed March 1, 1909.

23 VIII.

In the Court of Claims.

28727.

JESSE B. HUSE
v.
UNITED STATES.

Application for and Allowance of Appeal.

From the Judgment of the Court of Claims heretofore rendered herein, the claimant by his attorneys on this 10th day of May, A. D. 1909, makes application for an appeal to the Supreme Court of the United States.

BRANDENBURG AND BRANDENBURG,
Attorneys for Claimant.

Filed May 10, 1909.

On May 20, 1909, Mr. Brandenburg for the claimant presented an application for the allowance of appeal filed May 10, 1909, and it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

24 In the Court of Claims.

No. 28727.

JESSE B. HUSE
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause, of the findings of fact and conclusion of law, and the Opinion of the Court, of the Judgment of the Court dismissing the petition, of the Order of the Court on the motion of *of* Claimant for new trial and to amend the findings of the Court of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 3d day of June, A. D. 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,732. Court of Claims. Term No. 253. Jesse B. Huse, appellant, vs. The United States. Filed June 18th, 1909. File No. 21,732.

19

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

JESSE B. HUSE, *Appellant*,
v.
THE UNITED STATES.
} No. 74.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

EDWIN C. BRANDENBURG,
CLARENCE A. BRANDENBURG,
F. WALTER BRANDENBURG,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

October Term, 1911.

JESSE B. HUSE, *Appellant*,
v.
THE UNITED STATES. } No. 74.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

Statement of Facts.

The appellant filed his petition in the Court of Claims to recover for the alleged wrongful termination of a contract for carrying mail in the city of Omaha, Nebraska, and also for extra services performed in connection therewith. The Court of Claims in disposing of the case made findings of fact, and, as a conclusion of law, held that the appellant was not entitled to recover and dismissed his petition.

From the findings of fact it appears that on September 16, 1901, the Postmaster-General advertised for proposals for carrying mails in various cities, and, among others, for screen-wagon, mail-messenger, transfer and mail-station service at Omaha, Nebraska, for the period between July 1, 1902, and June 30, 1906. The advertisement, so far as it related to the service at Omaha, specified various stations to and from which the mail was to be carried, together with the names of certain railroads

carrying mail to and from the same, with the mail route numbers of each of such railroads. Among the stations mentioned was the Union Station, and the railroads specified as carrying mail to and from such station were the Illinois Central, route No. 143,077, the Union Pacific, route No. 157,001, the Chicago, Rock Island and Pacific, route No. 157,064, and the Missouri Pacific, route No. 157,075 (schedule, record, p. 6). While the schedule specified the foregoing roads, it omitted and failed to refer to the fact that the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash railroads, which carried two-fifths of all the mail entering that station were to be served by the contractor (pp. 11, 13; Findings V, XI).

The instructions to bidders, made part of the advertisement and contract, stated that the schedules annexed to the instructions showed approximately the services during a certain period named but required bidders to personally inform themselves of the amount and character of the service to be required (record, p. 7). In order to comply with this stipulation, and to inform himself as to the amount and character of the service to be performed, the appellant consulted the postmaster and superintendent of mails at Omaha. Though the *officials*, and perhaps the only *officials* at Omaha, possessing knowledge on the subject of inquiry, they *failed to give appellant any information whatever but, in answer, referred him back to the instructions to bidders pursuant to which he had called on them*, and also to a Mr. Anderson who had been in charge of the work under a former contract (record, p. 7). According to the third finding of fact, Mr. Anderson explained to the appellant "the three depots including the Union Station and the mail to be taken from them." It does not appear that Mr. Anderson informed appellant that he would be required to take

all the mail from the Union Station; nor whether Mr. Anderson ever knew what the particular proposal under consideration called for, nor what the nature of the contract was under which he had charge, nor whether such contract stipulated some or all of the roads entering the station, nor whether he truthfully informed the appellant as to the facts, nor whether he was interested, as a bidder or otherwise, in misleading the appellant. Thereupon, and with his information limited to what he could learn from a man who had charge under a former contract, but how many years before does not appear, with no information whatever from the officials charged with the duty of furnishing information and who possessed knowledge and to whom he appealed, the appellant submitted a proposal to carry the mail as stipulated in the advertisement for the sum of $7,889 per annum (record, p. 7), which amount, in view of the amount subsequently paid by the defendant for the same service, upon declaring him in default, was evidently about one-half its real value. This proposal was accepted and a contract entered into, with the United States Fidelity and Guaranty Co. as surety for its performance (record, p. 7).

The contract is set forth at length in the findings of fact (Finding III) and provides, among other things, that the appellant should perform "such additional service of *said kind* or kinds as *provided by the terms of said advertisement*" without additional compensation. For the contract services, the defendant agreed to pay the appellant $7,889 in quarterly instalments in the months of November, February, May and August. The services were to begin on the 1st day of July and the claimant was to become entitled to the quarterly payments as stated. The contract further provided that for certain delinquencies specified, the Postmaster-General might impose fines, the amounts of such fines to be "withheld"

from the stipulated payments (record, p. 10). It also provided that for repeated failures to perform the services contracted for, for violating the postal laws, or for disobeying the instructions of the Department, the Postmaster-General might annul the contract (record, p. 10).

The appellant proceeded to equip himself to perform the service and although insisting that he was prepared, the Department considered and the court below found, that he had not provided the necessary wagons for the performance of the service, and, accordingly, the Postmaster-General refused to permit him to begin his service until August 21. Between July 1 and August 20, when the appellant was permitted to begin work, the Department procured temporary service for which it paid $1,108.70 which it charged against the appellant (record, p. 11; Finding IV).

When the appellant began to render service, the Postmaster-General required him to carry all the mail arriving at the Union Station, not only that arriving over the four roads specifically mentioned in the advertisement for proposals, but also that arriving at said station over the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash railroads, roads not mentioned in the advertisement. The appellant immediately protested against this requirement as not being within his contract. He was required however to carry such mail and did so, under protest, until his contract was annulled (record, p. 11; Finding V).

At the time the contract was entered into seven railroads entered the Union Station and delivered mail there, namely, the Illinois Central, the Union Pacific, the Chicago, Rock Island and Pacific, the Missouri Pacific, the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash. Of these roads, all except the Illinois Central entered the Union Station from Council

Bluffs, Iowa, across the river from Omaha, and over the bridge and tracks of the Union Pacific Railway. Each of said roads so entering said station had a separate mail contract with the United States. The contracts however between the Government and the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash gave Council Bluffs as the terminus of such roads, while the contracts of the other three roads gave Omaha as their terminus (record, pp. 10, 11; Finding VI). All six of said roads however actually carried the mail into the Union Station at Omaha in their own trains and delivered it at that point. For the convenience of the Government, the mail carried by the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash under their several contracts "were credited to the Union Pacific route and weighed thereon" and were treated by the Department as mail trains of the Union Pacific Railroad Company though not so in fact (record, p. 12). It does not appear that the appellant was aware of this arrangement, or that he had any reason for believing in its existence, nor that he could have ascertained the fact had he anticipated its existence and inquired concerning it.

At various times while engaged in the service and because of the kind of help he employed, his failure to keep his horses and wagons in satisfactory condition, his failure to have his employees wear the regulation caps and badges and other specified delinquencies, the Postmaster-General imposed fines amounting to $288 during the period between August 21, 1902, and January 1, 1903, which were paid. Other fines were imposed for failures between that date and May 20, 1903, when the contract was annulled, amounting to $49.50. This amount was not paid (record, p. 12; Finding VIII). The contract however stipulated that such fines should be deducted or withheld from the applicant's compensa-

tion, and in May there was due him a quarterly payment under his contract in excess of the amount of such fines (record, p. 10).

It should be noted that these criticisms of equipment and horses occurred subsequent to October 1, 1902, and may naturally be attributed to the severity of the winter season at that locality, as well as by the added burden placed upon him in the requirement to carry a large quantity of mail in excess of that which he understood was called for by the contract, for the reason that the postmaster at Omaha reported on that date that the horses, wagons and harness used were in good condition and in accordance with the requirements of the contract (p. 12; Finding VII).

On March 24, 1903, appellant asked to be relieved from his contract claiming that owing to the construction placed thereon by the Department, that he be required to serve the three roads not mentioned in the instructions to bidders, he could not perform the service for the compensation stipulated. This request was refused (record, pp. 11, 12; Findings V, IX). On April 15, 1903, the Department wrote to the appellant giving him until July 1, 1903, to improve the service and requiring him to make certain repairs to his equipment and to replace 10 horses by May 1, 1903. The appellant failed to comply with these requirements, and on May 20 the Department annulled the contract "because of his failure and refusal to comply *with the instructions of the Postmaster-General as set forth in Finding VIII*" (record, p. 13; Finding IX). Referring to finding eight, there is a statement that the appellant "failed to comply with the instructions of the Postmaster-General" (record, p. 12). The delinquencies mentioned in finding eight were adjusted by fines imposed and paid or retained from appellant's pay. The "instructions" with which appellant failed to comply

and which the court finds in Finding IX was the ground for rescinding the contract, are not set forth, and whether warranted by the terms of the contract or whether reasonable or just, does not appear. There is no finding that the contract was annulled for failure of the appellant to repair his equipment or furnish 10 horses by May 10. The annulment took place after the notice giving him until July 1 within which to improve the service and prior to that date. At the time this notice was given, the quarterly payment for the service for the quarter ending March 31 was overdue and unpaid (record, p. 13; Finding XIII).

Upon the annulment of the contract, the Department installed temporary service from May 20 to October 1 at the rate of $14,965 per annum, *about double the amount contracted to be paid the appellant*. A contract was awarded to others at the rate of $13,250 per annum for the period from October 1, 1903, to June 30, 1906, for the same service the appellant was required to perform at $7,889 per annum (record, p. 13; Finding X).

The court below found as a fact that the mail arriving at Omaha over the railroads not enumerated in the advertisement for proposals amounted to two-fifths of the total mail received at that point and that the reasonable value for carrying the same, upon the basis of the appellant's contract, was $2,366.70 (record, p. 13; Finding XI); that upon the annulment of his contract the appellant disposed of his outfit at a loss of $700 (Finding XII); that he had not been paid for his services under his contract from January 1 to May 20, which, at the contract price, amounted to $3,034.22, less $49.50, fines imposed, leaving a balance on this account of $2,984.72 (record, p. 13; Finding XIII). There is no finding as to the amount of profits lost by the appellant if the contract is held to have been improperly annulled and the appellant,

throughout the period of his service, was entitled to compensation at the contract rate for the extra service required.

No counter-claim was filed by the United States, nor have any damages been "assessed and liquidated by the Auditor for the Post Office Department" as provided by the contract.

The Court of Claims, as a conclusion of law, decided that the appellant was not entitled to recover and dismissed his petition (record, p. 13). From this action the appellant has prosecuted this appeal.

Assignments of Error.

The appellant claims and insists that the court below erred—

First: In dismissing the petition.

Second: In finding and holding as matter of law that the service performed by the appellant in carrying mail arriving at the Union Station over the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash railroads was a service contemplated by the contract.

Third: In finding and holding that the contract was lawfully annulled.

Fourth: In failing to render judgment in favor of the appellant for the value of the services required in carrying mails arriving over the three railroads not specified in the advertisement for proposals.

Fifth: In failing to render judgment in favor of the appellant for the services performed by him, under his contract, between January 1 and May 20, 1903.

Sixth: In failing to render judgment in favor of appellant for the damages sustained by reason of the wrongful annulment of his contract.

Seventh: In failing to render judgment in favor of the appellant for the amount paid for temporary service and retained from appellant's pay, and for the amount of fines likewise so retained.

BRIEF OF ARGUMENT.

From the foregoing statement of facts, the issues, which naturally suggest themselves, are three in number, namely:

First: Whether the contract required the appellant to carry mail arriving at the Union Station over the three railroads not mentioned in the advertisement for proposals, or whether the carrying of such mail was an extra service for which the appellant is entitled to compensation;

Second: Whether the contract was properly annulled;

Third: Even if properly annulled, whether the appellant is not entitled to judgment at least for the contract price for the services actually performed, no counterclaim having been filed and no damages having been assessed and liquidated by the Auditor of the Post Office Department.

The Carrying of Mails Arriving over Roads not Mentioned in the Advertisement for Proposals Was an Extra Service for which the Appellant Was Entitled to Compensation.

The contract itself recites (record, p. 8) that the appellant "has been accepted as contractor for transporting mails on route No. 47,005, being the screen-wagon service at the city of Omaha, Nebraska, under an advertisement issued by the Postmaster-General on the 16th

day of September, 1901, for such service, which advertisement is hereby referred to and made by such reference a part of this contract, and for performing such additional service of *said kind*, or kinds, as is provided by the terms of said *advertisement*." The obligation assumed by the appellant was to carry "said mail" (par. 1 of contract). To ascertain therefore the service required, reference must be had to the advertisement incorporated in the contract. Contained in the advertisement (record, p. 6) is a schedule of services performed during the week ending July 21, 1901. In the instructions to bidders, also made part of the advertisement and contract, it is provided that the schedules referred to in the advertisement "show approximately the service as performed during the week named in the statement of service for each route." The schedule (record, p. 6) enumerates the railroad stations to and from which the mail was to be carried. Among the stations so enumerated is the Union Station. Immediately following such reference is a statement of the railroads delivering mail at said station. The roads so named are the Illinois Central, the Union Pacific, the Chicago, Rock Island and Pacific, and Missouri Pacific, each of which had a contract with the Government for carrying mail, the number of each of such routes being also given. There is no mention whatever of the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul, or Wabash railroads, with each of which the Government also had a mail contract, and each of which roads brought mail from the territory served by them into the Union Station and in its own cars. From the foregoing, we think it clear that the contract itself, on its face, failing to make any reference to the mail brought to the Union Station by the three roads referred to, does not cover the mail brought to such station over such

roads, unless the carrying of the mail brought to said station by said roads can be considered as "additional service," and we submit that it may not be.

The additional service mentioned in the contract evidently had reference to some new service subsequently arising and not a service then existing and equally as important as the service expressly provided for. It can hardly be reasonably said that under a contract requiring a man to carry mail arriving over four roads specifically mentioned, he could be required, as additional service, to carry mail arriving over three other and different roads not mentioned. All seven of the roads entering Union Station were bringing mail therein at the time the contract was made. Additional service is merely an increase in the particular service covered by the contract. Thus, if a greater number of trips should have been necessary to carry the mails arriving over the four roads specifically mentioned, the Postmaster-General might require such service as additional service without compensation. That is the idea expressed in the opinions of the Court of Claims in the following cases:

Woolverton *v.* U. S. 27 C. Cls. 292;
Knox *v.* U. S. 30 *id.* 59;
Woolverton *v.* U. S. 34 *id.* 247.

Even where the services required are precisely of the same nature as those contemplated by the contract and between the same points and therefore might justly be considered "additional services," yet where the amount of such additional service increases unreasonably the burden assumed, such services are treated as extra services for which compensation has been allowed. Thus, in the case of the Utah Stage Co. *v.* U. S. 39 C. Cls. 420, affirmed by this court (199 U. S. 422) the court said:

> "The very magnitude of the service exacted by the Post Office Department changed the service in kind and character."

In that case the service performed was twice the amount contemplated by the terms of the contract itself. In this case the court below found the mail brought over the three roads not mentioned in the advertisement was two-fifths of the total mail which the appellant was required to carry to and from Union Station. The similarity between the two cases is striking and the slight difference in the ratio between the work stipulated by the contracts and the work required in the two cases, is not sufficient, we submit, to prevent the application of the principle laid down in the case cited.

But this case is even stronger than the *Stage* case referred to in this, whereas in that case the service was in fact additional service, in this case it can not in any sense be said to be additional service. The appellant could not have been required to carry the mail in Council Bluffs though the service was precisely of the same character as that contemplated by the contract of appellant, because his contract in terms restricted the service to the city of Omaha, and for the same reason the appellant should not have been required to carry the mail arriving over the roads not mentioned because the contract in terms restricted the appellant's duty to carrying mail arriving over certain roads specifically named. That but suggests, as we contend, the mere similarity in character of the service required, does not make such service additional. As applied to this contract, it meant such additional service as might be required to transport the mail arriving over the roads specifically named.

If, as we submit, the contract on its face did not, by its special provisions, require the appellant to carry the

mail arriving over roads not mentioned, or under the general provision relating to additional service, then we further submit, as the contract specifies the particular roads transporting the mail which the appellant was to carry, parol evidence was inadmissible for the purpose of showing that the contract required appellant to carry mail brought to Omaha over other roads not mentioned. It was competent for the Government to contract for the carrying of all the mail arriving at Omaha, and had such been its purpose, it was easy to have so provided. It was also competent for the Government to contract for the carrying of the mail arriving at a particular station over particular roads, and when it did so, as in this case, it is not competent by parol evidence to show the circumstances surrounding the execution of the contract to extend its application to roads not mentioned. The language used by this court in the *Utah Stage* case (199 U. S. 422) is as definitely applicable as if this had been the case then under consideration. The court there said:

> "The second question involved is as to the right of the contractor to recover because the Government's advertisement for proposals, instead of stating the number of elevated stations to be served at four, which was, in fact, the number, gave the number of stations at two, thus doubling the number of trips necessary. It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but in the present instance, the Government in its advertisement had positively stated the number of stations at two. The contractor had a right to presume that the Government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the Government agents and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document

> was prepared for the guidance of bidders for Government service, that the general statement that the contractor must investigate for himself, and of non-responsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt. We think the Court of Claims correctly allowed this item."

In this case the appellant also had the right to presume the Government agents knew how many railroads were to be served. It was a fact peculiarly within the knowledge of the agents of the Government and upon which, in the advertisement, they spoke with certainty. And this view is particularly so, when we consider that the appellant applied to the agents of the Government, possessing this peculiar knowledge, and they declined to give him any information on the subject but referred him back to the advertisement itself. We therefore submit, that as the contract is clear and specific on its face, parol evidence as to extend the obligation and duty of the appellant to roads not mentioned, was inadmissible.

If the contract on its face clearly required appellant to carry all the mail brought into the Union Station, then of course the consideration of the circumstances surrounding the execution of the contract is immaterial. If it does not do so, and we are in error in our contention that for the reasons stated parol evidence as to such circumstances is inadmissible for the purpose of extending the obligation and duty of the appellant, then it becomes necessary to ascertain what investigation the appellant should have made, what investigation he did in fact make and what his knowledge was as to the service expected of him at the time the contract was executed.

While the court below assumed, rather than demonstrated, that the contract by its terms required the appellant to carry all the mail arriving at the Union Station,

which, if true, would have rendered immaterial the extent of appellant's knowledge of the service expected of him, nevertheless, it seems to have been a matter of great doubt as the court proceeded to consider and discuss at length the circumstances attending the execution of the contract, and it was apparently upon the consideration of such facts, rather than upon a construction of the contract itself, that the court concluded, as matter of law, that the service required of appellant was contemplated by both parties to the contract at the time of its execution and covered thereby.

The instructions to bidders, which were made part of the advertisement and contract, provided (Finding II; record, p. 7) that bidders "must personally inform themselves of the amount and character of the service that will be required during the contract term beginning with July 1st, 1902. Bidders and their sureties are warned that they should familiarize themselves with the terms of the contract, schedule of service and instructions contained herein."

The schedule of service, which alone stipulated the service to be performed, limited such service to the carrying of mail brought into the Union Station by the railroads specifically named. It was the duty of appellant to familiarize himself with the nature and amount of the mail brought by *those roads*. That was the purpose of the notice given him and we believe, the only purpose. The duty of the appellant was limited to such investigation, and we assume, whether he made such investigation or not, he would be charged as if he had done so. But the Government had the right to contract for the transportation of mail brought into the Union Station by four of the roads entering there or all of them and by the terms of the advertisement, it restricted it to four only, specifically named. It follows there was no duty on the part of

the appellant to make any investigation concerning the amount of mail brought into the station by the three roads not named, whether he in fact knew such roads brought mail into said station or not. He did not bid to carry the mail brought over the roads not named. What this court said in the *Utah Stage* case, heretofore referred to, is again pertinent to this contention:

> "We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for government service, that the general statement that the contractor must investigate for himself, and of nonresponsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt."

If we are correct in the view just expressed, then the actual knowledge of the appellant is immaterial. But if nevertheless an actual duty rested upon him in this respect, then it is proper to consider whether he performed it and what he learned and what he knew when he entered into the contract. It seems to us, however, that the only proper object of such inquiry would be to ascertain whether appellant knew or was informed, prior to executing the contract, that by its advertisement calling for bids to carry mail arriving at the Union Station over the four roads named, the Government contemplated that he should also carry mail arriving over the other roads arriving at that station though not mentioned. *There is no finding that he was so informed* or that he knew the advertisement meant something more than it said. The court below made a specific finding upon the feature now discussed. In Finding III (record, p. 7), it is stated that (1) prior to entering into the contract the claimant carefully read the advertisement and instructions to bidders and knew that the trains of the Chicago and

Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash railroads entered the Union Station at Omaha; (2) and to further inform himself as to the "amount and character of the service to be performed, he consulted the Postmaster and Superintendent of Mails at Omaha *who called his attention to the instructions to bidders*"; (3) and also to a "Mr. Anderson, who had been in charge of the work under *a* former contract, who explained to him the three depots, including the Union Station, and the mail to be taken from them"; (4) *After the execution of the contract*, and before he entered upon its performance, the appellant performed temporary service under a prior contract therefor, and in so doing carried all the mail arriving at the Union Station; and (5) also after the execution of his contract and before entering upon his duties, the postmaster at Omaha informed him he would be required to carry all of said mail (record, p. 11; Finding V). The last two facts, occurring after the execution of the contract, we submit, can have no bearing upon the interpretation of the contract or as charging appellant with knowledge as to the extent of the service required of him at the time of executing such contract. Moreover, the nature of the contract for temporary service and the compensation thereunder, do not appear. Just as soon as appellant entered upon the performance of his contract, and just as soon as he was directed to carry the mail arriving over the roads not mentioned, he protested against it as not being within his bid and contract and all service subsequently rendered was rendered subject to such protest (Finding V). We have then, as found by the court, the fact that the claimant knew "that the trains of the Chicago and Northwestern, the Chicago, Milwaukee and St. Paul and the Wabash railroads entered the Union Station at Omaha." He also knew that "the Chicago, Rock Island and Pacific Railway Co. and the

Missouri Pacific Railway Co. also crossed the Missouri River from Council Bluffs over the bridge of the Union Pacific Railroad in order to enter the Union Station at Omaha, each operating under a separate mail route contract" (Finding V). That is to say, that three of the four roads mentioned in the advertisement as well as the roads not mentioned, all entered Omaha from Council Bluffs over the tracks of the Union Pacific Railroad Company. *There was no apparent difference between such roads* in respect to the mails and absolutely the only difference in *fact* was that the mail route contracts with the three roads not named terminated at Council Bluffs, though they actually sent their trains to the Union Station and delivered their mail there, such mail being treated by the Government, for its own convenience, as mail of the Union Pacific Railway Company, a fact not known to the claimant. The enumeration therefore by name of some of the roads entering the Union Station, all bringing mail therein in precisely the same manner, and all bringing it over the tracks of the Union Pacific Railway Company, was an exclusion of the mail arriving over the roads not named.

With reference to the second element of this question, it will be noted that as required by his proposal and "to further inform himself as to the amount and character of the service to be performed, he consulted the postmaster and superintendent of mails at Omaha who called his attention to the instructions to bidders." *And no doubt just here is where the trouble arose.* These officers, possessing peculiar knowledge of the subject and of the intent and purpose of the Government and of the peculiar situation with reference to the Union Pacific road, instead of giving appellant the information he sought, instead of telling him he would be expected to carry mail over roads not named as well as those named notwithstanding the pro-

visions of the advertisement, referred him back to the instructions to bidders pursuant to the provisions of which he had called upon them. The finding proceeds with the statement that these officials, instead of themselves giving the information sought, also referred the appellant to a Mr. Anderson who had charge of the work under "*a* former contract" and that he explained to appellant the three stations and the mail to be carried therefrom. (Record, p. 7.) Mr. Anderson had not been the contractor. Whether he had ever seen the contract of his employer does not appear. What the provisions were of the former contract under which he worked do not appear. Whether such contract required the carrying of all the mail, whether it specifically mentioned some of the roads entering the Union Station or all of them, whether his explanation related to the mail brought by all the roads into Union Station, or whether in answer to appellant's inquiries, he limited his information to the roads named, does not appear. How long before Mr. Anderson had rendered services does not appear. He was a mere employee and it does not appear that he knew anything of the contract of his employer. Whether he truthfully informed appellant does not appear. Certainly it does not appear that he informed the appellant that by such an advertisement as that under consideration, the appellant would be expected to carry all the mail brought into Union Station. Certainly, with such a finding as that under consideration, the court can not say that the appellant was informed that he would be expected to carry all the mail from the Union Station

That claimant was not advised either by Mr. Anderson or by the postmaster or his assistant that he was expected to serve the three roads not mentioned is best borne out by the fact that the court fails to find that he was in fact informed or advised that these three roads were to be

served. It is certainly a proper conclusion to be drawn from the finding as made that the evidence produced failed to show that claimant was informed notwithstanding the inquiries, for most assuredly had the court believed that he had been advised of the actual facts it would have found as a positive fact that these persons notified claimant that the roads omitted had to be served in the same manner as those specified.

We therefore respectfully contend, first, that by its terms the contract excluded the mail brought into the Union Station over roads not mentioned in the advertisement and that it was not competent to extend, by parol evidence, the duty of the appellant to such roads; and further, that if such evidence was competent, it shows the appellant fully performed his duty in making inquiry and that, after making such inquiry, he was not informed and had no knowledge that the Government, by its advertisement, expected him to carry mail arriving over roads not mentioned therein.

The Contract was Wrongfully Annulled.

The ninth finding of fact (Record, pp. 12, 13) is as follows:

> "March 24, 1903, claimant asked to be relieved from his contract, claiming that owing to the construction placed upon it by the Post Office Department he could not perform the service required. This request was refused by the Postmaster-General.
>
> "April 15, 1903, the Department wrote to claimant giving him until July 1, 1903, to improve the service, and requiring him to make certain repairs to his equipment, and to replace ten horses by May 10, 1903. Claimant failed to comply with these requirements and on May 20, 1903, the Post Office Department annulled said contract with claimant *because of his failure and refusal to comply with the*

instructions of the Postmaster-General as set forth in Finding VIII."

From that finding, it is clear beyond question that the contract was not annulled for the failure of the appellant "to make certain repairs to his equipment and to replace ten horses by May 10, 1903." The contract was annulled, as the court below found, because of appellant's "failure and refusal to comply with the instructions of the Postmaster-General as set forth in Finding VIII." Finding VIII (Record, p. 12) is that at various times appellant failed in the performance of his contract in respect to the kind of help he employed, and also failed to keep his horses and wagons in good condition and in the other respects therein stated. The finding then proceeds, "and he failed to have his drivers wear the regulation caps and badges, *and to comply with the instructions of the Postmaster-General.* For *such failures and delinquencies* not satisfactorily explained to the Postmaster-General he imposed fines amounting to the sum of $288 up to January 1, 1903, which were paid. Other fines were imposed for failures between that date and May 20, 1903, amounting to $49.50, which amount has not been paid by claimant."

The contract provides (Record, p. 10) that for the failures and delinquencies of the appellant as found by the court in Finding VIII, the Postmaster-General might impose fines, and fines were in fact imposed therefor. The contract further provides (p. 10) that the "Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post Office Department." Those are the only provisions relating to annulment having any bearing upon this issue. From them it therefore appears that the contract provides two grounds for annulment,

first, repeated failures, for which fines might be and were in fact imposed, and second, for refusing to obey the *instructions* of the Postmaster-General. These are two distinct and different grounds for annulment. In this case, the contract was not annulled for "repeated failures" for which fines might be and were imposed, but, as definitely set forth in Finding IX, "because of his failure and refusal to comply with the *instructions of the Postmaster-General as set forth in Finding VIII.*" But there are no instructions set forth in Finding VIII which it is shown the appellant violated or failed to perform. Because of the distinction the contract itself makes between defaults for which fines might be imposed and the failure to comply with the intructions of the Postmaster-General, as a basis for annulment, it should appear what instructions, if any, were in fact given, that were violated, in order that this court might for itself determine whether they were reasonable or not and whether they were such as the law and the contract required the appellant to perform.

While the failure to comply with the requirement to furnish ten new horses by May 14, added to the previous delinquencies of the appellant as found by the court, might have formed the basis for annulling the contract on the ground of "repeated failures" for which the contract specially provides, the contract was not annulled on that ground, and such delinquencies are therefore immaterial. Moreover, Finding VIII, after reciting the various failures of the appellant, provides "and he failed to have his drivers wear the regulation caps and badges; and to comply with the instructions of the Postmaster-General. For such failures *and* delinquencies not satisfactorily explained to the Postmaster-General, he imposed fines amounting to the sum of $288 up to January 1, 1903, which were paid. Other fines were imposed between that date and May 20, 1903, amounting to $49.50, which amount has not been paid by claimant."

It is clear from the foregoing that the delinquencies of the appellant, including his failure "to comply with the instructions of the Postmaster-General" set forth in Finding VIII, and which the court below in Finding IX finds was the grounds for annulling the contract, had previous to the annulment, been adjusted by the imposition of fines which had been in fact paid. While the finding states that the fines aggregating $49.50 imposed between January 1, 1903, to May 20, 1903, had not been paid, no demand had been made for its payment, it was not the custom to require payment, and the quarterly payment amounting to approximately two thousand dollars was then overdue, and by the terms of his contract (p. 10) it was provided "that there may be withheld from his pay such sum as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency." The legal effect, therefore, with reference to the penalties aggregating the trifling sum of $49.50 (covering delinquencies during a period of nearly five months), there having been due to the appellant at the time more than the amount thereof, is that such fines were paid automatically by lessening the amount payable to him. Finding VIII, which sets forth the grounds for annulling the contract, namely, his "failure to comply with the instructions of the Postmaster-General," as well as the delinquencies therein stated, were all adjusted by fines imposed and paid. May the Government, therefore, impose and collect fines for violation of its instructions and thereafter use the defaults for which the fines were imposed as a basis for the annulment of the contract? We respectfully submit that it may not do so. To so hold would seem to be inequitable and unjust in addition to being illegal.

The Postmaster-General was not required to impose fines. He was not required to adjust defaults by the

imposition of fines. When, however, he elected, under the terms of the contract, to impose such fines, the delinquencies and defaults for which such fines were imposed and paid ceased to exist as a basis for the annulment of the contract. While it may be true that fines may be imposed and paid for delinquencies, yet, if thereafter the contractor again defaults, such former defaults, although thus adjusted, may possibly, in connection with the subsequent defaults, be treated as repeated failures, but in such an event *the annulment must rest on the ground of such failures in view of the special provision of the contract in relation thereto.* But, as has been shown, the annulment in this case definitely rested upon the appellant's "failure and refusal to comply with the instructions of the Postmaster-General as set forth in Finding VIII," and while the specific instructions violated are not set forth in that finding, it appears that "for such failures and delinquencies," that is, failure "to comply with the instructions of the Postmaster-General" as well as the delinquencies in respect to the kind of help employed, etc., were adjusted by the fines imposed and paid. The other failures were satisfactorily explained.

We therefore submit that, on the facts as found by the court below, the action of the Postmaster-General in annulling the appellant's contract was without right and unlawful.

In the next place, it will be noted that by its notice dated April 15, 1903, although the Department gave the appellant until July 1 to improve his service, which might reasonably be said to include the providing of the ten new horses, yet, by the same notice, the appellant was required to replace the ten horses by May 10. The contract term of service of the appellant began on July 1. His compensation was to be paid quarterly. He was paid to January 1. His pay for the quarter ending March 31,

1903, was not paid, when due, and has never been paid (Finding XIII, p. 13). At the time this payment fell due, *the contract had not been annulled and the appellant was not in default.* The only obligation assumed on the part of the Government was to pay the appellant for the services rendered. The duty of making such payments, when due and promptly when due, was as great as the duty of the appellant to perform the service agreed upon. The Government had no right to retain the quarterly payment due the appellant *as against the possibility that he would not comply with the instructions of the Postmaster-General that he furnish additional equipment by a day subsequent to the maturity of the payment.* The bond of the appellant fully protected the Government against such failure if it should occur. At the time the Postmaster-General annulled this contract the Government itself was in default in respect of the only obligation it assumed, to wit, the payment of the stipulated compensation, and being in default, it had no right to annul the contract.

> "A party to a contract in default in the performance of his part of the terms and provisions thereof has no right, as a matter of law, while so in default, to rescind the contract for the failure or refusal of the other party to perform."
>
> Mason *v.* Thompson, 94 Minn. 472.
> Graf *v.* Cunningham, 109 N. Y. 372.
> Hatton v. Johnson, 83 Penna. St. 222.
> Meyers *v.* Gross, 59 Ill. 439.

Whatever may be said with reference to the default in failing to pay the contract price, the defendant was also certainly in default in reference to the payment for the extra service required of him, if we are correct in our contention as to the proper construction of the contract.

We therefore submit that as the defendant itself was in default, it had no right to annul the contract unless such annulment be treated as the exercise of the right to terminate the contract at any time upon allowing the contractor an additional month's pay. If so treated, judgment should have been rendered for the appellant.

It will be remembered that the appellant tendered himself ready to begin his contract service on July 1, 1902, but was denied permission, because, in the opinion of the Postmaster-General, his equipment was insufficient. Temporary service was secured at an expense of $1,108.70 and charged to the appellant and deducted from his pay, subsequently earned, and a fine of $50 imposed (Finding IV). For various delinquencies, as found by the court below, fines aggregating $288 were imposed and paid. The appellant tendered himself ready to perform the service *the contract required of him*. The Postmaster-General required him to equip himself for the performance of work nearly double the amount contemplated by the contract. The fines imposed were for delinquencies incident to the performance of this greatly increased service. We submit that the action of the Department in refusing permission to appellant to undertake the work and the imposition of the fines for delinquencies in its performance, were improper, because the Postmaster-General, as a basis therefor, improperly required appellant to equip himself to perform the service not contemplated by the contract. He had no right to refuse appellant permission to begin his work if he was equipped to perform the service the contract lawfully required. The refusal to permit him to do so because he was not equipped to perform service outside of his contract, was therefore wrongful, and the charge against the appellant on that account improper.

One can not help but be impressed with the fact that the requirement that appellant furnish ten new horses, at a probable cost of several thousand dollars, while the Government at the same time was withholding, without right and at a time when the contractor was not in default, the pay to which he was entitled and with which he might have procured such new horses, was unreasonable, unwarranted and unjust.

The government officials at Omaha certainly knew precisely the amount of mail that had to be carried. They certainly knew what service was expected of the contractor. They certainly knew whether, by the language used, it was contemplated that appellant should carry all the mail arriving at the Union Station. Nevertheless, those officials withheld this information from the appellant when, pursuant to the requirement of the instructions to bidders, he made inquiry in good faith.

It is clear from the findings that the amount stipulated to be paid was just about one-half of the real value of the services the Government expected, if it did so expect, appellant to perform. This fact, in connection with the immediate protest of the appellant, when advised that he was expected to carry all the mail arriving at the Union Station, make it clear that he was misled by the advertisement and by the conduct of the postmaster and superintendent of mails at Omaha. The appellant as well as other bidders were also no doubt misled further by the advertisement furnished as a guide to bidders, for at the bottom of schedule (record, p. 6), it wrongfully gave the contract price then being paid for carrying the mail under a contract No. 457,004 instead of under contract No. 457,005 which was the contract for which bids were sought. The price given, $2,650, was evidently the price being paid for a contract requiring much less

service. The disaster to the appellant resulted and the present suit arises, first, because the contract did not stipulate in plain language for the carrying of all the mail arriving at Union Station but in terms restricted the service to certain roads named; second, because of the mistake in the schedule of service as to the price then being paid for the service; third, because of the failure or refusal of the officials at Omaha, the postmaster and superintendent of mails, in response to the appellant's request, to give him any information as to the service expected of him; fourth, because of the failure of the Department in its advertisement or otherwise to advise bidders that the reference in the advertisement to specific railroads included roads not named; fifth, because of the failure of the Government to promptly pay the appellant for services performed, whereby he might have been able to comply with its requirement, however onerous. As against this, the record discloses no fault on the part of the appellant. It wholly fails to show any failure on his part to make due inquiry as to the service expected of him, or knowledge in advance of executing the contract, of the relations between the Union Pacific Railroad and the other railroads not mentioned in the advertisement. We think under these circumstances that the language of the Court of Claims in the case of Otis *v.* United States, (20 C. Cls. 315) is pertinent:

> "A contract prepared at the post-office, leaving to the contractor no choice as to form or phraseology, must be construed in a doubtful case in favor of justice and against the Government.

We believe that reasonably construed, and strictly construed certainly so, that the service required of the appellant was not covered by his contract.

Whether or Not the Contract was Properly Annulled, the Appellant is Entitled to Judgment for Services Rendered.

The amount due appellant for the quarter ending March 31, 1903, was never paid. He performed services to May 20th. The Court of Claims found that if entitled to recover, the contract price for this service was $2,984.72. If the appellant's construction of the contract is correct, there was due at that time, if entitled to recover, the additional sum of $2,366.70. No counter-claim was filed in this case. The contract (Record, p. 10), immediately after providing for its annulment, provides as follows:

> "Such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counter-claim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor for the Post-Office Department."

No counter-claim was filed and no damages have been assessed by the Auditor for the Post-Office Department. To offset the amount found to be due the appellant therefor, it was necessary for the defendant, as with any other litigant, to file a counter-claim if it intended to insist upon one, particularly where, as in this case, the loss sustained by the defendant, if any in fact was sustained, arose after the annulment of the contract. Upon that issue, if presented, the appellant would have been entitled to be heard and was, as a matter of right and justice, entitled to be apprised by the pleadings. Because

the evidence shows that at the time of the annulment of the contract there was due the appellant $2,984.72 for services rendered, at the contract rate, and if the appellant's contention as to the construction of the contract is right, the additional sum of $2,366.70 for the extra services performed, together with the sum of $900 as the loss on the outfit, we submit the court below erred in failing to render judgment for those amounts.

We respectfully submit the judgment of the court below should be reversed.

EDWIN C. BRANDENBURG,
CLARENCE A. BRANDENBURG,
F. WALTER BRANDENBURG,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

JESSE B. HUSE, APPELLANT,
v.
THE UNITED STATES. } No. 74.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Suit was brought in the Court of Claims for $12,222.08 by Jesse B. Huse, a mail contractor. Claim was made for extra service; pay from date of contract to the time when service began; for money withheld when contract was annulled; for money lost on sale of outfit, and for loss of profits.

On September 16, 1901, the Postmaster General advertised for proposals for carrying the mails in screen wagons prescribed by the Post Office Department between the post offices, railroad stations, etc., in a number of cities; among them the city of Omaha, Nebr., route No. 457005, "Screen-wagon service," from July 1, 1902, to June 30, 1906. The

advertisement cautioned bidders to read carefully the instructions contained therein and to fill in properly all of their proposals.

The advertisement further contained the schedule of service performed at Omaha, Nebr., on the advertised route for the week ended July 27, 1901, and stated the service between the general post office and a number of railroad and electric-car stations; among them, between the general post office and the Union Station at Omaha, as follows:

UNION STATION.

Illinois Central R. R. Co. (143077).
Union Pacific R. R. Co. (157001).
Chicago, Rock Island & Pacific Ry. Co. (157064).
Missouri Pacific Ry. Co. (157075).
(Finding 1, Rec., pp. 5 and 6.)

Paragraph 1 of the instructions to bidders, which were a part of the advertisement and contract, warned prospective bidders that the above schedule of service was only approximate and that they "must personally inform themselves of *the amount and character of the service*" that would be required by the contract, and bidders and their sureties were warned to familiarize themselves with the terms of the contract, the schedules of service, and the instructions before assuming any liabilities, so as to prevent any misapprehension or cause of complaint thereafter. (Finding 2, Rec., p. 7.)

Before submitting his proposal appellant personally informed himself as to the amount and char-

acter of the service between the general post office and the Union Station, and knew that the trains of the Chicago & North Western, the Chicago, Milwaukee & St. Paul, and the Wabash Railroads entered the Union Station, and he further knew just what mails were to be transferred from them to the post office, and vice versa. (Finding 3, Rec., p. 7.)

At the time of the advertisement September 16, 1901, and for a number of years before, the postal routes of the Chicago & North Western, The Chicago, Milwaukee & St. Paul, and the Wabash, Nos. 135003, 143028, and 145061, respectively, from Chicago, Marion, and Pattonsville, Mo., terminated at Council Bluffs, Iowa, and all of the mails from these three roads were transferred to the Union Pacific trains and by it carried into Omaha. Long before the advertisement referred to, and about the time the Union Station was built, the three railroads in question procured an entrance into Omaha over the tracks of the Union Pacific, and the Post Office Department, in order to avoid delay in transfer of the mails, arranged with said roads and the Union Pacific for them to carry the mails from Council Bluffs on the route and track, and under the rules, and on the time prescribed by the Union Pacific, into the Union Station at Omaha. The trains performing this service were treated by the Post Office Department as mail trains of the Union Pacific Railroad, route No. 157001, and all mails carried by the said three roads were weighed on and credited to the Union Pacific route, and pay-

ment therefor was made to the Union Pacific Railroad Company. The contractor on the same screen-wagon route, who preceded the appellant, carried the mails to and from the trains of these three railroads as part of his contract, and everybody having knowledge of the service knew that he did so. (Finding 6, Rec., pp. 11 and 12.)

The appellant had more than general knowledge. He had knowledge obtained directly from the man who had charge of the ~~route before him~~ work under a former contract (Finding 3, Rec., p. 7), and also because he himself had carried the mails as temporary contractor before entering upon his own contract, and must have learned something about the quantity and character of the mail before entering the temporary service (Finding 5, Rec., p. 11).

Having acquired, as he thought, sufficient knowledge of the service to enable him to make an intelligent bid, on October 30, 1901, he submitted a proposal to carry the mails on screen-wagon route No. 457005 for the sum of $7,889 a year, stating in his proposal, among other things, that—

> This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service, and also after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby.

His proposal was accepted by the Postmaster General on January 15, 1902 (Finding 3, Rec., p. 7), and a contract was entered into on the same day

between the appellant and the United States by which he agreed to perform, at the city of Omaha, Nebr., the screen-wagon service on route No. 457005 in accordance with the terms of the advertisement above referred to, which was made a part of the contract, from July 1, 1902, to June 30, 1906, for the sum of $7,889.

The contract also provided that the appellant should furnish a sufficient number of suitable horses and wagons, sufficient harness, and competent drivers to insure the prompt delivery of the mails, subject to inspection, approval, and control of the postmaster at Omaha; and both the contract and instructions to bidders provided for the annulment of the contract for repeated failures; for violating the postal laws; disobeying instructions of the Post Office Department, and for not keeping his horses, wagons, and harness in good and serviceable condition. (Rec., pp. 7–11, 16.)

At the beginning of the contract term the appellant had not provided himself with the necessary wagons for the performance of his contract, and for that reason he was not permitted to begin service on the route until August 21, 1902, during which period service was performed by temporary contract, and the expenses and a fine of $50 was charged to the appellant. (Finding 4, Rec., p. 11.)

The appellant performed the service under his contract from August 21, 1902, to May 20, 1903, during which time he failed to employ competent men or to keep his horses and wagons in good con-

dition. His employees were at times careless and neglectful in receiving and delivering mail, particularly from street cars and the platform at the post office, frequently putting pouches on the wrong electric cars and leaving the screen wagons unlocked. The drivers also failed to wear regulation caps and badges and to comply with the instructions of the Postmaster General. For failures and delinquencies not satisfactorily explained to the Postmaster General he was fined at different times between August 21, 1902, and May 20, 1903, when his contract was annulled, $288 of which was paid and $49.50 of which remains unpaid. (Finding 8, Rec., p. 12.)

On March 24, 1903, appellant asked to be relieved from his contract, alleging as a reason that, owing to the construction placed upon the same by the Post Office Department, he was unable to perform the service required, but the Postmaster General declined to release him. On April 15, 1903, however, the department notified him that his service must be improved by July 1, 1903, requiring him to make certain repairs to his equipment and to replace 10 of his horses by May 10, 1903, all of which he failed to do. On May 20, 1903, his contract was annulled for his failure and refusal to comply with instructions of the Postmaster General. (Finding IX, Rec., pp. 12, 13.) Upon the annulment of the contract, a temporary service was installed from August 20, 1903, to October 1, 1903, at the rate of $14,965 per annum, amounting for the period stated to the sum

of $2,525.46 in excess of the amount for the same period provided by the contract.

After the annulment of the contract a contract was awarded to other parties for service from October 1, 1903, to June 30, 1906, the unexpired term of appellant's contract, at the rate of $13,250 per annum, making the excess cost to the Government $14,742.75 over appellant's contract price for the same period. (Finding 10, Rec., p. 13.)

The Postmaster General withheld from appellant the sum of $3,034.22, being the pro rata compensation under his contract for the period from January 1, 1903, to May 20, 1903, when the contract was annulled. (Finding 13, Rec., p. 13.)

On the foregoing facts the court below decided as a conclusion of law that "the claimant is not entitled to recover, and his petition is therefore dismissed."

ITEMS OF CLAIM.

At the time this brief goes to print, Government counsel have not been served with appellant's brief.

We understand the items of the claims to be:

(1) For carrying the mails brought into and taken out of the Union Station by the Chicago & North Western, the Chicago, Milwaukee & St. Paul, and the Wabash Railroads, over the tracks of the Union Pacific Railroad, $2,366.70. (Finding 9, Rec., p. 13.)

(2) Pro rata compensation provided by contract for period from July 1, 1902, to August 21, 1902,

when appellant was not allowed to perform service, $1,095.

(3) Compensation withheld for period from January 1, 1903, to May 20, 1903, during which he performed service, and at the end of which his contract was annulled, $2,984.72. (Finding 13, Rec., p. 13.)

(4) Amount lost on sale of outfit, $900. (Finding 12, Rec., p. 13.)

(5) Loss of profits, $4,875.

QUESTIONS OF LAW INVOLVED.

(1) The right of the Postmaster General to require appellant to carry the mails brought into and carried out of the Union Station by the Chicago & North Western, the Chicago, Milwaukee & St. Paul, and the Wabash Railroads, entering said station over the tracks of the Union Pacific Railroad, as route No. 157001.

(2) The right of the Postmaster General to require appellant to provide suitable equipment for the service as provided by his contract, and to refuse to permit appellant to begin such service until the same should be furnished.

(3) The right of the Postmaster General to annul the contract for repeated failures to perform the service in accordance with the contract and for refusal to obey the instructions of the department issued by his authority.

No fraud or deception was practiced on appellant as to the quantity of mails to be carried under his contract to and from the Union Station.

The obligation rests upon every man of reasonable prudence and intelligence to properly inform himself before incurring any liability under a proposed contract, and unless fraud or deception has been employed in inducing him to enter into the contract, he will be held to have so informed himself.

In the case at bar, however, after having been cautioned that the sample schedule of service exhibited in the advertisement was only approximate, appellant was required by the instructions to bidders to personally inform himself of the *character and amount* of the work he would be called upon to perform, before incurring any liability, in order to prevent any misapprehension or cause of complaint thereafter. Not only was he required to investigate the conditions for himself, but he was required to state in his proposal, which he did, that he had made such examination and made his proposal "after due inquiry into and with full knowledge of all particulars in reference to the service."

This court in the case of *Dair* v. *The United States* (16 Wall., 1-6) said as a conclusion of its reasoning on the subject of estoppel *in pais:*

> It is, accordingly, established doctrine that whenever an act is done or statement made by a party, which can not be contradicted without fraud on his part and injury

> to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence.

See also *Dickerson* v. *Colgrove* (100 U. S., 578, 580.)

The Court of Claims found that " the claimant carefully read the advertisement and instructions to bidders, and familiarized himself with their terms, and knew that the Chicago & North Western Railroad, the Chicago, Milwaukee & St. Paul Railroad, and the Wabash Railroad entered the Union Station at Omaha, and to further inform himself as to the amount and character of the service to be performed he consulted the postmaster and superintendent of mails at Omaha, who called his attention to the instructions to bidders." He also consulted a Mr. Anderson, who had been in charge of the work under a former contract, who explained to him the mail to be taken from the Union Station, and the other two stations, " *and the number of wagons it would take to perform the service.*" (Finding 3, Rec., p. 7.)

The mails carried from Council Bluffs, Iowa, to Omaha, Nebr., by the Chicago & North Western, the Chicago, Milwaukee & St. Paul, and the Wabash Railroads were transported over the tracks of the Union Pacific Railroad and were treated by the Department and the three roads in question as Union Pacific mails, route No 157001. The mail routes of the three roads running into Omaha over

the Union Pacific tracks terminated at Council Bluffs. At one time the mails from these three roads were transferred to Union Pacific trains and carried by them into the Union Station at Omaha, but for convenience and dispatch an arrangement was entered into between the said roads and the department by which the mails instead of being transferred at Council Bluffs were carried into Omaha by the three roads. The court says:

> The screen-wagon contractor under the preceding advertisement and contract, which was similar to the one in this case, carried mails to cover the trains of said three roads as part of his contract, and these facts were known to persons having knowledge of the service. (Finding 6, Rec., pp. 11 and 12.)

The Court of Claims in its opinion says:

> There was no guarantee by the Government as to the amount of mail that the claimant would be required to carry other than all the mails entering the Union Station, and as to that he was admonished to make inquiry for himself. (Rec., p. 15.)

The court further says the service required of the appellant in carrying mails to and from the three roads—

> can not be considered either as new, extra, or additional service within the meaning of these terms as adjudicated by this court (*Utah, Nevada & California Stage Co.* v. *The United States,* 39 C. Cls., 435; *Profit* v. *United States,* 42 ibid., 248), and must,

> therefore, be held to be part of the service contemplated and covered by the terms of the contract; and the claimant is not, therefore, entitled to recover for said service.

The contract required appellant "to perform without additional compensation any and all additional service that the Postmaster General may order during the term * * * between the post office and railroad stations * * *." (Rec., p. 9.) The mails had been carried from the Union Station by former contractors on the same route for many years before appellant undertook to perform the service, and the contract required him to furnish sufficient wagons "to transport the whole mail, whatever may be its size, weight, or increase during the term of his contract," to and from the Burlington Station, the Union Station, and the Webster Street Depot, and three street railways. (Schedule of service, Rec., p. 6.)

The right of the Postmaster General to require suitable equipment of appellant before commencement of his service under his contract.

Appellant contends that he was prepared to commence work under his contract on July 1, 1902, when the contract should have gone into effect, and claims that by reason of the refusal of the Postmaster General to allow him to proceed he is entitled to recover $1,095.66, the contract price of the service for the period from July 1, 1902, the date of the contract, to August 21, 1902, the date when he was allowed to begin service. The Court of

Claims disposes of this item in its findings as follows:

> At the beginning of the contract term, July 1, 1902, the claimant had not provided the necessary wagons for the performance of the service under his contract as required by the Postmaster General, and for that reason he was not permitted to commence said service until August 21, 1902, at which date he had provided himself with such equipment. From July 1 to August 21, 1902, the Postmaster General authorized temporary service and charged the cost thereof to the claimant to the amount of $1,108.07, and in addition a fine of $50 was imposed for his failure to provide the necessary equipment as aforesaid. (Finding 4, Rec., p. 11.)

Therefore, according to the lower court, the appellant, instead of being entitled to recover the sum of $1,095.60 was properly charged by the Postmaster General with $1,158.70. The right of the Postmaster General to take this action can not be questioned. By the terms of the contract appellant and his sureties bound themselves—

(1) To furnish wagons " in sufficient number and of sufficient capacity to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract * * * subject in all respects to the approval of the Postmaster General." (Rec., p. 8.)

(3) " To furnish the number of said wagons (of the required sizes) that, in the opinion of the Post-

master General, will be sufficient for the prompt and proper performance of the service," etc.

The Postmaster General was therefore made the judge of the proper equipment to be furnished by appellant before commencing the services, and, in the absence of bad faith, his right to annul the contract upon appellant's refusal to provide suitable equipment can not now be assailed.

> *United States* v. *Arredondo,* 6 Pet., 691.
> *United States* v. *California and Oregon Land Co.,* 148 U. S., 31.

The right of the Postmaster General to annul appellant's contract for refusal to obey his instructions.

The contract provided that for failure to properly perform the service the Postmaster General might withhold from the compensation of appellant such sums as he might impose as fines or deductions and might annul the contract " for repeated failures; for violating the postal laws; for disobeying the instructions of the Post Office Department." (Rec., p. 10.)

The contract made provision for a suitable and complete equipment for carrying the mails and constituted the Postmaster General the exclusive judge of its fitness for the service.

The court finds that—

> At various times throughout the period claimant was engaged in service under his contract he failed in its performance in respect to the kind of help he employed, and also failed to keep his horses and wagons in

> good condition; he kept in his employ boys and drivers who were careless and neglectful at times in receiving and delivering mail, and particularly from street cars and the platform at the post office, frequently putting pouches on the wrong electric cars and leaving wagons unlocked; and he failed to have his drivers wear regulation caps and badges." (Finding 8, Rec., p. 12.)

Appellant was ordered on April 15, 1903, to improve his service, " requiring him to make certain repairs to his equipment," and he was given until July 1, 1903, to do so; he was also required to " replace 10 horses by May 10, 1903."

Appellant failed to comply with these reasonable requirements, and in accordance with the terms of the agreement on May 20, 1903, the department annulled the contract. (Finding IX, Rec., p. 13.) The court below said:

> There is no contention that the Postmaster General grossly abused the discretion lodged in him to annul the contract. The facts upon which he based his action were ascertained by the officers of the Government in the usual way; and there is nothing in this case which would justify the court in holding that he abused his discretion, even if the court felt at liberty to go behind the facts upon which he based his action. (Rec., p. 17.)

The court below referred to the case of *Slavens* v. *The United States* (196 U. S., 229), where it was

held that the Postmaster General had authority sufficiently broad and comprehensive to enable him to discontinue the entire service under contract upon the payment of one month's extra pay as provided therein.

The right of the Postmaster General to annul the contract for failure on the part of appellant to comply with the instructions of the department clearly embraced the right to withhold payment for services already performed and to relet the contract at appellant's expense.

The opinion of the court below, delivered by the chief justice, presents a very careful and clear analysis of just what the contract contained. There are no complications about the facts. It is shown by Finding X (Rec., p. 13) that owing to the failure of appellant to perform his contract in accordance with the terms and requirements thereof the Government sustains a loss of over $14,000.

We ask that the judgment be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.
GEORGE M. ANDERSON,
Attorney.

HUSE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued November 17, 1911.—Decided January 9, 1912.

A mail service contractor cannot claim that he accepted a contract under misapprehension when between the time of his proposal and its acceptance he took a temporary contract for carriage of the identical mails contracted for.

A contract for delivery of all mails at Union Station, Omaha, was properly construed by the Postmaster General as including mail delivered by three railroads not in the schedule, it appearing, however, that the mail so delivered had formerly been delivered by one of the railroads mentioned in the schedule and were included in a route specified in the contract.

A mail service contractor whose contract had been cancelled for failure to perform sued in the Court of Claims for balance due and for damages for cancellation; that court held he was not entitled to judgment for the balance due because it appeared that the contract was properly cancelled and that the Government had sustained damages in excess of the balance due. In this court, *held:* that as the objection that the balance due could not, in the absence of a counterclaim pleading, be offset against the damages sustained by the Government had not been raised in the Court of Claims, that court rightly offset it, and the objection cannot be raised for the first time on appeal in this court.

Quære: Whether the rules of practice in the Court of Claims would not permit the offset to be made in absence of any pleading setting up counterclaim or offset.

44 C. Cl. 19, affirmed.

THE facts, which involve the construction of a contract for screen-wagon mail service in Omaha, Nebraska, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for appellant:

The carrying of mails arriving over roads not men-

tioned in the advertisement for proposals was an extra service for which the appellant was entitled to compensation. *Woolverton* v. *United States*, 27 C. Cl. 292; *Knox* v. *United States*, 30 C. Cl. 59; *Woolverton* v. *United States*, 34 C. Cl. 247, distinguished; and see *Utah Stage Co.* v. *United States*, 39 C. Cl. 420; affirmed, 199 U. S. 422.

If the contract on its face did not, by its special provisions, require the appellant to carry the mail arriving over roads not mentioned, or under the general provision relating to additional service, then as the contract specifies the particular roads transporting the mail which the appellant was to carry, parol evidence was inadmissible for the purpose of showing that the contract required appellant to carry mail brought to Omaha over other roads not mentioned.

By its own terms the contract excluded the mail brought into the Union Station over roads not mentioned in the advertisement and it was not competent to extend, by parol evidence, the duty of the appellant to such roads; and further, if such evidence was competent, it shows the appellant fully performed his duty as to making inquiry and that after so doing he was not informed and had no knowledge that the Government, by its advertisement, expected him to carry mail arriving over roads not mentioned therein.

On the facts as found by the court below, the action of the Postmaster General in annulling the appellant's contract was without right and unlawful.

At the time the Postmaster General annulled this contract the Government itself was in default in respect of the only obligation it assumed, to wit, the payment of the stipulated compensation, and being in default, it had no right to annul the contract. *Mason* v. *Thompson*, 94 Minnesota, 472; *Graf* v. *Cunningham*, 109 N. Y. 372; *Hatton* v. *Johnson*, 83 Pa. St. 222; *Meyers* v. *Gross*, 59 Illinois, 439.

As the United States itself was in default, it had no

right to annul the contract unless such annulment be treated as the exercise of the right to terminate the contract at any time upon allowing the contractor an additional month's pay. If so treated, judgment should have been rendered for the appellant.

The record discloses no fault on the part of the appellant. It wholly fails to show any failure on his part to make due inquiry as to the service expected of him, or knowledge in advance of executing the contract, of the relations between the Union Pacific Railroad and the other railroads not mentioned in the advertisement. *Otis* v. *United States*, 20 C. Cl. 315.

Reasonably construed, and strictly construed certainly so, the service required of the appellant was not covered by his contract.

Whether or not the contract was properly annulled, the appellant is entitled to judgment for services rendered.

No counterclaim was filed and no damages have been assessed by the Auditor for the Post-Office Department. To offset the amount found to be due the appellant, therefore, it was necessary for the defendant, as with any other litigant, to file a counterclaim if it intended to insist upon one, particularly where, as in this case, the loss sustained by the defendant, if any in fact was sustained, arose after the annulment of the contract. Upon that issue, if presented, the appellant would have been entitled to be heard and was, as a matter of right and justice, entitled to be apprised by the pleadings.

Mr. Assistant Attorney General Thompson, with whom *Mr. George M. Anderson* was on the brief, for the United States:

No fraud or deception was practiced on appellant as to the quantity of mails to be carried under his contract to and from the Union Station.

The obligation rests upon every man of reasonable

prudence and intelligence to properly inform himself before incurring any liability under a proposed contract, and unless fraud or deception has been employed in inducing him to enter into the contract, he will be held to have so informed himself. *Dair* v. *United States*, 14 Wall. 1, 6; *Dickerson* v. *Colgrove*, 100 U. S. 578.

The Postmaster General has the right to require suitable equipment of appellant before commencement of his service under his contract.

The Postmaster General was the judge of the proper equipment to be furnished by appellant before commencing the services, and, in the absence of bad faith, his right to annul the contract upon appellant's refusal to provide suitable equipment cannot now be assailed. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Cal. & Oreg. Land Co.*, 148 U. S. 31.

The Postmaster General had the right to annul appellant's contract for refusal to obey his instruction.

Appellant failed to comply with reasonable requirements, and in accordance with the terms of the agreement, the Department annulled the contract. *Slavens* v. *United States*, 196 U. S. 229.

The right of the Postmaster General to annul the contract for failure on the part of the appellant to comply with the instructions of the Department clearly embraced the right to withhold payment for services already performed and to relet the contract at appellant's expense.

The opinion of the court below presents a careful and clear analysis of what the contract contained. There are no complications about the facts. It is shown that owing to the failure of appellant to perform his contract in accordance with the terms and requirements thereof the Government sustained a loss of over $14,000.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant had a four-year contract, commencing

July 1, 1902, for screen-wagon mail service between the post-office and railway mail stations at Omaha, Nebraska. On May 20, 1903, the Postmaster General cancelled the contract and relet it to other parties. Thereupon appellant brought this suit in the Court of Claims, asserting that he had faithfully performed his agreement, but that he had been required to carry mails to and from three railway companies not included in his contract. That his equipment was ample for the service he contracted to render, but that he had been ordered to provide equipment adequate to the excessive service demanded, and that the cancellation of his contract was therefore unauthorized. His suit was to recover, first, the balance due under the contract as construed by the Department; second, the reasonable value of the excess service he had, under protest, been compelled to render; third, the loss of profit resulting from the wrongful annulment of his contract; and, finally, the loss sustained in disposing of equipment which had been bought for the purpose of carrying out his contract.

As is the case with mail contracts, the manner and means of performance were carefully prescribed and power was reserved to the Postmaster General to require other and further facilities if it should be found necessary for the good of the service. The power of the Postmaster General to supervise and the duty of the contractor to conform to his regulations were plainly written down. That vigilant and prompt service might be enforced, he was given the right to make deductions, by way of fines, from compensation earned, for defects in equipment or negligence in the performance of the service. For repeated failures in performance or acts of neglect, or disobedience to orders, he was given power to annul the contract without impairing the right of the Government to recover damages for non-performance.

The findings of the court below as to the repeated

failures of the appellant in the performance of his contract, the inadequacy of his equipment, and his disobedience to the requirements that he should enlarge and improve his facilities, make it clear that the Postmaster General did not act arbitrarily, nor exceed the power reserved, by the infliction of fines or the final cancellation of the agreement on May 20, 1903. When the contract was cancelled it was directed that compensation due should be withheld and the contract relet at the contractor's expense. This reletting was at a price of some $14,000 in excess of what the cost would have been if appellant had performed his agreement. The court below found that when the contract was annulled there was due appellant $2,984.72. For this a judgment was asked, but denied, the court below finding that the loss to the Government as a result of reletting the contract was greatly in excess of the amount due to appellant. His petition was therefore dismissed.

If the contract, fairly construed, exacted the amount of service which the Department claimed, the case of appellant must fail, in view of the facts found as to his insufficient performance, and the loss resulting to the Government from the necessity of reletting the unfinished term of the agreement.

The Postmaster General construed the contract as requiring appellant to receive from and deliver to all railroads using the Union Station at Omaha. This construction required him to receive from and deliver to three railroad companies, not specified in the contract, namely, the Wabash, the Chicago and Northwestern and the Chicago, Milwaukee and St. Paul. The case must, therefore, turn upon the question as to whether the service contemplated by his contract included mails to and from the railways mentioned.

Coming, then, to the service required by the contract. The proposal for the Omaha mail-wagon service and its acceptance were according to a printed official form. This

proposal and acceptance, making the contract proper, refer to and make the public advertisement of the Postmaster General for proposals a part of the agreement, and from it the service contemplated is discovered. That advertisement included certain "instructions to bidders," of which they were required to take notice. Among other things, these "instructions" included the following provision:

"The foregoing schedules show approximately the service as performed during the week named in the statement of service for each route. Bidders, however, must personally inform themselves of the amount and character of the service that will be required during the contract term, beginning with July 1, 1902. Bidders and their sureties are warned that they should familiarize themselves with the terms of the contract, schedules of service, and instructions contained herein before they shall assume any liabilities as such bidders or sureties, to prevent misapprehension or cause of complaint thereafter."

Under the heading "Union Station," in the schedule referred to, there appear the names of four railroad companies opposite the words "Union Station," applicable to each of the named companies, thus: "Union Station; Illinois Central R. R. Co. (143077); Union Pacific R. R. Co. (157001); Chicago, Rock Island and Pacific Rwy. Co. (157064); Missouri Pacific Rwy. Co. (157075)."

It will be noticed that the named railroads bringing mail into the Union Station do not include the Wabash, the Chicago and Northwestern, or the Chicago, Milwaukee and St. Paul. Notwithstanding this omission, appellant was required to carry to and from the Union Station the mails delivered there by these three companies and to be delivered there from the post office to be carried by the same companies. This appellant did under protest, and upon this his suit is grounded.

But the explanation and answer is simple: Originally,

the contract routes of these companies terminated at the Union Pacific transfer at Council Bluffs, Iowa, where the mail was transferred to the Union Pacific Railway and carried into Omaha. After the construction of the Union Station, each of these companies procured the right to carry their mail over the Union Pacific Railway into the Union Station. This saved delay in transfer. The court below found that "the trains so performing said service were known and treated by the Post-Office Department as mail trains of the Union Pacific Railroad Company, route No. 157,001, and were operated under the rules of said Union Pacific Railroad Company, and payment was made therefor to the said Union Pacific Company. All weights of mail carried by said three roads were credited to the Union Pacific Railroad route and weighed thereon. The screen-wagon contractor under the preceding advertisement and contract, which were similar to the one in this case, carried mails to and from the trains of said three roads as part of his contract, and these facts were known to persons having knowledge of the service."

This had for many years been the method of handling the mails carried by the three companies referred to when appellant made his proposal. True, he says he did not know it; but the advertisement warned him of the necessity of making himself familiar with the "terms of the contract, schedule of services and instructions herein before they should assume any liabilities as such bidders or sureties, to prevent misapprehension." Among the facts found is this:

"Prior to submitting said proposal the claimant carefully read the advertisement and instructions to bidders and familiarized himself with their terms, and knew that the trains of the Chicago and Northwestern Railroad, the Chicago, Milwaukee and St. Paul Railroad, and the Wabash Railroad entered the Union Station at Omaha, and to further inform himself as to the amount and character

of the service to be performed he consulted the postmaster and superintendent of mails at Omaha, who called his attention to the Instructions to Bidders, also a Mr. Anderson, who had been in charge of the work under a former contract, who explained to him the three depots, including the Union Station, and the mail to be taken from them and the number of wagons it would take to perform the service."

Knowing of the manner in which the mails carried by the three railroads in question were handled, acquired after the contract was signed, is not of course, fatal to his contention that the contract did not include that mail matter. It does, however, appear that after his proposal had been accepted and before the beginning of performance he actually took a temporary contract, for the carriage of the identical mails, so that when he entered upon his own regular contract he was fully aware of the conditions. This must, at least, weaken the force of his going forward under protest. But aside from this information, the advertisement and instructions warned him to familiarize himself with the situation by personal investigation and inquiry. This he asserted he had done, for in his printed proposal he stated that, "This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service and also after careful examination of the conditions attached to said advertisement and with intent to be governed thereby."

But it is urged that appellant is at least entitled to a judgment for $2,984.72, which the court below found to be the amount due when the contract was terminated. This contention is based upon the absence of any pleading setting up as a counterclaim or set-off the difference between the cost of the service under the reletting and the entire contract price for the full term under appellant's contract. But no such objection seems to have been made in the Court of Claims. That court had all the facts be-

fore it. It found that there was due on May 20, 1903, for services under the contract prior thereto $2,984.72. But it found, on the other hand, that at that date the contract had been lawfully annulled and that the necessary reletting had resulted in a loss to the Government of a very much larger sum. Upon this showing it properly concluded that the amount due was more than offset by the loss resulting from reletting at a higher price. How it might be if this objection had been seasonably made, it is not an error for which this court will reverse when not made until upon appeal. In *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 212, a like objection was made as to claims coming from the Court of Claims, and this court said:

"The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the $12,532.43 out of moneys due petitioner, which was, therefore, entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand."

Judgment affirmed.